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IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JOAN G. LOZOYA Plaintiff, v. ERIC J. ANDERSON, M.D.; LINDSEY BLAKE, M.D.; HOSPITAL CORPORATION OF AMERICA INC.; MOUNTAINVIEW HOSPITAL; FREEMONT EMERGENCY SERVICE, INC.; ALEXANDRA M. PAGE, M.D.; KAISER FOUNDATION HEALTH PLAN, INC.; KAISER PERMANENTE and DOES 1 through 30, inclusive Defendants.	CASE NO. 07 CV 2148IEG (WMC) **DEFENDANTS HOSPITAL CORPORATION OF AMERICA AND MOUNTAINVIEW HOSPITAL'S REPLY IN SUPPORT OF THE MOTION TO DISMISS PLAINTIFF'S COMPLAINT** DATE: June 2, 2008 TIME: 10:30 a.m. DEPT.: Court Room 1 Judge: Irma E. Gonzalez Magistrate: William McCurine, Jr. DATE OF FILING ACTION: 11/08/07

I. PLAINTIFF'S AMENDED COMPLAINT SHOULD BE DISMISSED UNDER THE FRCP 12(B)(6) STANDARDS

Plaintiff's Opposition to the instant Motion argues that the Amended Complaint should not be dismissed pursuant to FRCP 12(b)(6) as it complies with Rule 8 requirements for simple notice pleading. Defendants do not dispute the pleading requirements of Rule 8, however, the manner in which Plaintiff set forth her allegations in the Amended Complaint provide *prima facie* evidence that there is no cognizable claim for relief under EMTALA in this case.

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"As the Supreme Court recently explained, '[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a case of action will not do.'" *Atlantic Recording Corp, v. Serrano, 2007 WL 4612921, 2 (S.D. Cal. 2007), quoting Bell Atlantic Corp. v. Twombly, __ U.S. __, 127 S.Ct 1955, 1964, 167 L.Ed.2d 929 (2007).* "The complaint and all reasonable inferences therefrom are construed in the plaintiff's favor." *Walleri v. Fed. Home Loan Bank of Seattle, 83 F.3d 1575, 1580 (9th Cir. 1996).* "Nevertheless, conclusory legal allegations and unwarranted inferences are insufficient to defeat a motion to dismiss." *Ove v. Gwinn, 264 F.3d 817, 821 (9th Cir. 2001).*

In the instant matter, Plaintiff's Amended Complaint asserts allegations which, when taken as true, defeat the very elements necessary to establish a claim under 42 USC § 1395dd, et al. and those allegations should be dismissed by this Honorable Court pursuant to FRCP 12(b)(6). Those arguments are set forth more fully below.

II. PLAINTIFF'S FIRST CAUSE OF ACTION SOUNDING IN EMTALA SHOULD BE DISMISSED PURSUANT TO FRCP 12(B)(6)

Plaintiff's Opposition argues that Defendants are attempting to argue a motion for summary judgment under the guise of a FRCP 12(b)(6) motion to dismiss. This is not the case. "While the Court's review [of a 12(b)(6) motion] is generally limited to the contents of the complaint, the Court may consider documents attached to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice without converting the motion to dismiss into a motion for summary judgment." *Phillips v. Murdock, 2008 WL 852019, 2 (D. Hawaii 2008), citing Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). See also, Branch v. Tunnell, 14 F.3d 449, 453-54 (9th Cir. 1994)(documents whose contents are* *alleged in a complaint and whose authenticity is not questioned by any party may also be considered).*

In the instant case, the allegations of Plaintiff's complaint, without resort to additional information is sufficient to justify a dismissal of the EMTALA claims pursuant to FRCP 12(b)(6). "As numerous courts have noted, . . . , 'EMTALA is a limited 'anti-dumping' statue, not a federal malpractice statute." *Reynolds v. Maine General Health, 218 F.3d 78, 83, (1st Cir. 2000), quoting Bryan v. Rectors and Visitors of the Univ. of Va., 95 F.3d 349, 351 (4th Cir. 1996).* "So far as we can tell, every court that has considered EMTALA has disclaimed any notion that it creates a general federal cause of action for medical malpractice in emergency rooms." *Reynolds, 218 F.3d at 83, quoting Urban v. King, 43 F.3d 523, 525 (10th Cir. 1994).* "The avowed purpose of EMTALA was not to guarantee that all parties are properly diagnosed, or even to ensure that they receive adequate care, but instead to provide an 'adequate first response to a medical crisis' for all patients and 'send a clear signal to the hospital community . . . that all Americans, regardless of wealth or status, should know that a hospital will provide what services it can when they are truly in physical distress.'" *Reynolds, 218 F.3d at 83, quoting* 131 Cong. Rec. S13904 (Oct. 23, 1985)(statement of Sen. Durenberger). "Once EMTALA has met that purpose of ensuring that a hospital undertakes stabilizing treatment for a patient who arrives with an emergency condition, the patient's care becomes the legal responsibility of the hospital and the treating physicians. And, the legal adequacy of that care is then governed not by EMTALA but by the state malpractice law that everyone agrees EMTALA was not intended to preempt." *Bryan v. Rectors and Visitors of the Univ. of Va., 95 F3d at 351.*

To establish a cognizable claim for relief under the EMTALA, Plaintiff's must allege facts sufficient to suggest the hospital failed to 1) provide staff and facilities to treat and stabilize the patient's medical condition, or 2) transfer the individual to another facility. 42 U.S.C. § 1395dd(b)(1). "Transfer" within the EMTALA means both "discharge" and/or "movement" to another facility. 42 U.S.C. § 1395dd(e)(4).

It is undisputed that Ms. Lozoya came to MountainView Hospital's emergency room seeking medical attention. It is undisputed that x-ray images revealed a "comminuted right proximal humerus fracture." It is undisputed that the emergency room physicians caring for Ms. Lozoya placed her affected arm in an immobilizer and ordered pain medication. It is undisputed that Ms. Lozoya was discharged from the facility with recommendations to seek follow-up care for this condition within 48 hours.

The foregoing facts, as alleged in Plaintiff's complaint provide *prima facie* evidence that MountianView Hospital and its independently contracted emergency room physicians complied with their obligations under EMTALA; 1) they saw the patient, 2) they performed an appropriate screening, 3) they identified an emergent condition, 4) they stabilized the emergent condition, and 5) they provided instructions to the patient for ongoing care.

Plaintiff's Complaint attempts to argue that Ms. Lozoya's demand to see an orthopedic consult, or to be transferred to a trauma center to have the humeral fracture fixed, creates an emergency condition that required further treatment at MountinView Hospital or transfer to another facility. Such action is not contemplated by EMTALA. "EMTALA requires only that a hospital stabilize an individual's emergency medical condition; it does not require a hospital to cure the condition." *Green v. Touro Infirmary, 992 F2d. 537, 539 (5th Cir. 1993).* "The hospital's responsibility under the statute ends when it has stabilized the individual's medical condition." *Green, 992 F.2d at 539, citing Brooker v. Desert Hosp. Corp., 947 F.2d 412, 415 (9th Cir. 1991).*

Plaintiff's complaint makes no allegations that Ms. Lozoya was in anyway unstable. They do not allege that her vital signs were inappropriate, that her pain control was inadequate, that she was unable to ambulate or that her shoulder fracture was not properly secured and stabilized in the shoulder immobilizer applied at the hospital. Instead, Plaintiff argues only that Ms. Lozoya wanted further treatment in the form of an orthopedic consult or transfer to a trauma center. The alleged request by Ms. Lozoya does not, of itself, create an emergent condition, nor does it suggest in anyway that she was unstable so as to prevent discharge. "Congress limited recovery under EMTALA to situations where a plaintiff did not receive appropriate medical screening or was not stabilized before being transferred or discharged. *See Gatewood v. Washington Healtcare Corp., 933 F.2d 1037 (D.C. Cir. 199).*

Plaintiff's Opposition to the instant motion brings into specific relief her attempt to package a state law medical malpractice claim as an EMTALA violation. Plaintiff's Opposition argues, "Therefore, the standard of care for stabilization for this type of injury is not a band-aid and pain medication, rather immediate orthopedic consult and surgical intervention." (Plaintiff Opposition, pg. 8, lines 5-6). "The statute is not intended to create a national standard of care for hospitals or to provide a federal cause of action akin to a state law claim for medical malpractice." *Baker v. Adventist Health, Inc., 260 F.3d 987, 993 (9th Cir. 2001), citing Eberhardt v. City of Los Angeles, 62 F.3d 1253, 1258 (9th Cir. 1995).* Moreover, state law claims for medical malpractice and standard of care violations regarding treatment of a patient after EMTALA has been complied with are not subsumed by the EMTALA cause of action. "The statute expressly contains a non-preemption provision for state remedies." *Baker, 62 F.3d at 1258, citing 42 U.S.C. § 1395dd(f).*

It is clear, on the face of the Amended Complaint, that Plaintiff can not present a cognizable claim for relief under the EMTALA. She was seen by the MountainView Hospital emergency department staff and independently contracted physicians. She was given an appropriate medical screening in the form of numerous x-rays. Those x-rays revealed a right humeral fracture, which was appropriately considered an emergency condition. She was placed in a shoulder immobilizing sling to stabilize the fracture, given pain medication and instructed to follow-up with her physician in 48 hours. There is no allegation that Ms. Lozoya was unstable at the time of her discharge, that she was "dumped" or otherwise denied access to appropriate care. Instead, Plaintiff argues that she did not want to be discharged but wanted to see an orthopedic surgeon or be transferred to a Level 1 Trauma Center. There is nothing within the EMTALA that contemplates that level of care requested by Ms. Lozoya. Whether the act of discharging the patient met the applicable standard of care and whether that standard was violated when an immediate orthopedic consult was not obtained, are subject to state law medical malpractice claims. The very terms of the EMTALA suggest that it does not preempt state law claims, nor is it designed to provide a national standard of care for emergency room treatment. As such, Plaintiff's First Cause of Action should be dismissed pursuant to FRCP 12(b)(6).

III. THE ERIE DOCTRINE ALLOWS FOR THE APPLICATION OF THE MEDICAL EXPERT AFFIDAVIT REQUIREMENT UNDER NRS 41A.071

Plaintiff, in her Opposition, concedes that under NRS 41A.071 a complaint filed without an expert affidavit shall be dismissed without prejudice. However, Plaintiff argues that for purposes of *Erie*, NRS 41A.071 is procedural and not substantive, rendering it inapplicable in a federal court. It appears that Plaintiff has greatly oversimplified the ruling in *Erie*.

In applying Erie, the objective is "to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court." *Guaranty Trust Co. of New York v. York, 326 U.S. 99, 109 (1945).*

When bringing state law claims in federal court, state law governs substantive issues and federal law governs procedural issues. *Erie R.R. Co., 304 U.S. at 78.* The Erie rule may not be "invoked to void a Federal Rule of Civil Procedure." *Hanna v. Plumer, 380 U.S. 460, 470 (1965).* Under Hanna, a federal court must determine whether a Federal Rule directly "collides" with the state law sought to be applied. If no direct conflict exists, then the court applies the Erie rule to determine if state law should be applied. The issue in this case is whether or not NRS 41A.071 "collides" with FRCP 8.

To determine this, a federal court must consider whether the scope of the Federal Rule is "sufficiently broad to control the issue" before the court, "thereby leaving no room for operation of the state law." *Walker v. Armco Steel Corp., 446 U.S. 740, 749-50 (1980).* A broad reading of the Federal Rules that would create significant disuniformity between state and federal courts should be avoided if the text permits. *Stewart Org., Inc. v. Ricoh, 487 U.S. 22, 37-38 (1988).*

Plaintiff has failed even to address the argument that NRS 41A.071 is in conflict with FRCP 8. She has simply stated that the federal rule applies because NRS 41A.071 is procedural in nature. The Erie rule requires that the rules be analyzed to determine if a conflict exists. Erie does not rule out procedural state laws simply because they are procedural. Rule 8(a) provides that "a pleading which sets forth a claim for relief…shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends … (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." The filing of a medical expert affidavit along with a complaint as required by NRS 41A.071, does not expand or conflict with Rule 8(a)'s minimal pleading requirements. In fact, the affidavit requirement does not have any effect on the content of a Plaintiff's complaint. A plaintiff may still plead the grounds of his claim in a short plain statement while also attaching a medical expert affidavit as required by NRS 41A.071.

A finding that a medical expert affidavit does not conflict with the Federal Rules is consistent with the decisions of other federal courts. In *Chamberlain v. Giampapa, 210 F.3d 154 (3d Cir. 2000)*, the Third Circuit held that a New Jersey statute that required the filing of an affidavit of merit within 60 days of the defendant's answer did not conflict with Rule 8(a) or Rule 9. The Court noted that Rules 8(a) and 9 were geared toward providing notice of the parties' claims and defenses, while the purpose of the affidavit was to assure that malpractice claims that lacked expert support were terminated quickly. *Chamberlain, 210 F.3d at 160*. The Court held that the rule and the state law could "exist side by side" without conflict. *Id.* The purpose of Nevada's medical expert affidavit requirement is to weed out frivolous and unmeritorious lawsuits. *Borger v. Eighth Judicial Dist. Court, 120 Nev. 1021, 1029, 102. P.3d 600, 606 (Nev. 2004)*. Consistent with the ruling in *Chamberlain*, it is our contention that NRS 41A.071 and FRCP 8(a) are not in conflict and can therefore "exist side by side."

The failure to apply NRS 41A.071 in federal court would also result in forum shopping and lead to the inequitable administration of laws. Plaintiff is attempting to circumvent the application of the statute by avoiding state court and filing it in federal court. This is exactly the kind of practice that *Erie* sought to eliminate. For all of the reasons offered above, it is clear that the medical expert affidavit requirement of NRS 41A.071 passes the *Erie* test by not "colliding" with any of the Federal Rules of Civil Procedure and therefore must apply if the claims are heard in Federal Court.

IV. PLAINTIFF'S FAILURE TO COMPLY WITH BOTH NRS 41A.071 AND NRS 41A.097 MUST RESULT IN THE DISMISSAL OF THE MEDICAL MALPRACTICE CLAIMS

Plaintiff has asserted, in her Opposition, that this Defendant has liberally massaged the facts of her Amended Complaint in an effort to mislead the Court. Specifically, Plaintiff claims this Defendant has taken liberties with regard to the issue of inquiry notice of injury.

Although Plaintiff's counsel has provided a detailed summary of the events leading to the discovery of Plaintiff's injury, it appears that it is simply an attempt to deflect the fact that the Amended Complaint clearly indicates the approximate date that Ms. Lozoya became aware of her injury. The Amended Complaint speaks for itself and clearly states that Ms. Lozoya discovered, sometime after April 4, 2007, that the personal injuries sustained were a proximate result of the Defendants' negligent conduct. As laid out in the original Motion to Dismiss, the statute of limitations as modified by the discovery rule begins to run when the putative plaintiff has ***inquiry*** notice of a ***possible*** cause of action. Paragraph 52 of Plaintiff's Amended Complaint makes it clear that Ms. Lozoya had more than inquiry notice of a possible cause of action sometime after April 4, 2007.

Plaintiff, in her Opposition, has conveniently construed the phrase "sometime after April 4" to mean the middle of July in an effort to resuscitate the lapsed claims under Nevada state law. The question remains as to why Plaintiff felt it necessary to specifically indicate in her Amended Complaint that she became aware of Defendants' negligence in early April when she now claims it was nearly four months later that she realized she may have a cause of action.

Plaintiff also points out in her Opposition that she filed her Amended Complaint on the year anniversary of her injury in an abundance of caution. This fact would be relevant had she filed that Complaint with the statutorily required medical expert affidavit. As she clearly did not, the fact that she filed her Complaint within the statute of limitations is moot and the Complaint as filed is void ab initio. Plaintiff has requested leave to amend the Complaint should the Court see fit to dismiss the Second Cause of Action. The Plaintiffs in *Washoe* also attempted to remedy their Complaint by reviving it through amendment. The Supreme Court of Nevada held as follows:

> We conclude that a medical malpractice complaint filed without a supporting medical expert affidavit is void ab initio, meaning it is of no force and effect. Because a complaint that does not comply with NRS 41A.071 is void ab inito, it does not legally exist and thus it cannot be amended. Therefore, FRCP 15(a)'s amendment provisions, whether allowing amendment as a matter of course or leave to amend, are inapplicable. A complaint that does not comply with NRS 41A.071 is void and must be dismissed; no amendment is permitted.

Washoe Med. Ctr. v. Second Juf. Dist. Ct., 122 Nev. Adv. Rep. 110, 148 P.3d 790 (2006).

Plaintiff's claims of medical malpractice must be dismissed for the same reason that the claims were dismissed in *Washoe*. In both cases, the complaints were filed without a medical expert affidavit as required by NRS 41A.071. Plaintiff has argued that the failure to submit the affidavit of a medical expert will be "cured" by submitting an affidavit sometime following the hearing on June 2, 2008. However, the Nevada Supreme Court has made it abundantly clear in *Washoe* that a medical malpractice Complaint *must* include an affidavit supplied by a qualified medical expert upon filing, or be dismissed. Plaintiff in this case has failed to meet this requirement and therefore, the claims must be dismissed.

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CONCLUSION

For the reasons stated above, the Defendants Health Corporation of America, Inc. and MountainView Hospital's Motion to Dismiss should be granted.

As to the First Cause of Action in Plaintiff's Amended Complaint, Plaintiff has failed to provide a cognizable claim for relief under the EMTALA. The very terms of the EMTALA suggest that it does not preempt state law claims, nor is it designed to provide a national standard of care for emergency room treatment. As such, Plaintiff's First Cause of Action should be dismissed pursuant to FRCP 12(b)(6).

As to the Second Cause of Action, Plaintiff has failed to comply with both the medical expert affidavit requirement of NRS 41A.071 and failed to file a timely Complaint within the statutory limitations of 41A.097. As such, the Complaint is void ab initio meaning it does not legally exist and thus cannot be amended as Plaintiff has requested leave to do. Whether or not Plaintiff's federal claim is dismissed, the state law claims of medical malpractice must be dismissed for the aforementioned reasons.

Respectfully submitted.

DATED May 23, 2008

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